In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-798

A. H. ROBINS COMPANY, INC.,
Petitioner,

vs.

DEPARTMENT OF HEALTH OF THE STATE OF CALIFORNIA (formerly Department of Health Care Services of the Human Relations Agency, State of California), et al.,
Respondents.

Petitioner's Reply Memorandum

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TABLE OF AUTHORITIES

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In this case of first impression, the California Court of Appeal has interpreted a recently enacted provision of state law (California Welfare and Institutions Code Section 14053.5) to require manufacturers of prescription drugs to make their products available to *all* providers of those products at the *same* price. *A. H. Robins Co. v. Department of Health*, 59 Cal. App. 3d 903, 911 (1976). A manufacturer's failure to maintain uniform prices results in explusion from the State's Medi-Cal formulary, and a loss of millions of dollars of business annually.

The Department of Health of the State of California ("the State") would have this Court believe that the state-imposed uniform price control does not conflict with the federal antitrust laws for the reason that the State does not "prohibit Robins' pricing and marketing practices,"

but rather merely "restricts the circumstances under which [the State] will itself do business" with Robins. (Brief in Opposition to Petition for Certiorari ("Opposition Brief"), page 8).

This state-imposed price maintenance system is not nearly as innocent as the State claims. The State's refusal to reimburse providers for Robins' products is based solely on a statute which is in irreconcilable conflict with the federal antitrust laws (Petition, pages 8-9) and which will ultimately increase the cost of *all* Medi-Cal prescription drugs, including those costs paid by the federal Government. (Petition, pages 19-22). The State statute, so interpreted, constitutes an unconstitutional prohibition of and an infringement upon Robins' right to do business in the State of California.

Compliance with Section 14053.5 would force Robins to engage in vertical price-fixing contrary to Section 1 of the Sherman Act, 15 U.S.C. § 1 (Petition, pages 15 through 17) and would deprive Robins of rights guaranteed to it under the Robinson-Patman Act, 15 U.S.C. §§ 13(a) and 13(b). But noncompliance with Section 14053.5 would deprive Robins of its access to the *single most important market for its products in the State of California.* Either way, the State is illegally attempting to dictate the conduct of Robins' pricing and distribution policies in such a way as to effectively "prohibit Robins' marketing and pricing practices". (*cf.:* Opposition Brief, page 8).

The State's opposition here is flawed. First, its assertion that the only sanction for noncompliance with the statute is removal of a drug manufacturer's products from the Medi-Cal formulary does not cure the fundamental antitrust infirmities of the statute. A drug manufacturer which complies with the statute is forced to violate the Sherman

Act by engaging in *vertical price-fixing*. In order to insure that its products are made available to *all* prescription drug providers at the *same* price, the drug manufacturer must impose restrictions upon its wholesalers to fix their resale prices to retailers, contrary to Section 1 of the Sherman Act. (Petition, pages 15-17). Moreover, to require the manufacturer to make its products available to all providers at the same price would deprive the manufacturer of its rights recognized by Sections 2(a) and 2(b) of the Robinson-Patman Act, by preventing it from effecting price differentials based upon cost-justification and meeting good faith competition. (Petition, pages 10-15). In short, compliance with the statute places the drug manufacturer in jeopardy of prosecution for violation of the federal antitrust laws.

Secondly, the State's penalty for noncompliance with Section 14053.5—elimination from eligibility in the Medi-Cal formulary—is so substantial and severe that its implementation undermines Robins' ability to conduct business in the State of California. The State Medi-Cal program is not an insubstantial purchaser: in fact, the State Medi-Cal program has been the largest single purchaser of Robins' drugs in California. In fiscal year 1974-1975, the State paid $90,440,344 for reimbursement of Medi-Cal formulary drugs; in fiscal year 1975-1976, this figure increased 15.1% to total $104,134,283. And in 1974, alone, 2,103,826 persons were eligible to receive Medi-Cal benefits, including Robins' prescription drugs. (*See,* Data Matters, California Center for Health Statistics, Medi-Cal Pharmaceutical Drugs by Therapy Class, February 5, 1976.) Barring access to this market under the guise of a state health regulation is tantamount to prohibiting Robins and other manufacturers from doing substantial business in the State of California.

Furthermore, forcing drug manufacturers to forego the Medi-Cal market injures not only drug manufacturers but also over two million California Medi-Cal beneficiaries who are denied access to therapeutic drugs. And, because the decision below expressly disallows the granting of discounts to non-profit hospitals, the cost of pharmaceuticals for *all* hospital patients—not just Medi-Cal patients —has increased (Petition, page 21).

The rigid pricing policies imposed by Section 14053.5 work two serious harms. Its uniform pricing requirements threaten participating drug providers with the severe penalties of antitrust prosecution. They impose artifically and arbitrarily fixed prices at *all* levels of the consumer market in drugs sold through the Medi-Cal program. Accordingly, Section 14053.5 is not only in irreconcilable conflict with the federal antitrust laws and Title XIX of the federal Social Security Act, but also amounts to an unconstitutional infringement upon Robins' ability to do business in the State of California.

Finally, contrary to the State's assertion (Opposition Brief, page 10), this statute goes beyond the permissible limits of the State to legislate for the health and general welfare of its people, and constitutes an unreasonable interference with interstate commerce. A state does not have unlimited discretion in enacting laws which, while ostensibly dealing with legitimate state matters, nevertheless have the effect of unreasonably interfering with the competitive marketplace. The governing principle was stated by this Court in *H. P. Hood & Sons v. DuMond*, 336 U.S. 525, 538 (1949): "[T]he state may not use its admitted powers to protect the health and safety of its people as a basis for suppressing competition."

CONCLUSION

The State does not deny that Section 14053.5 increases the costs of prescription drugs to both the State of California and the United States government pursuant to the reimbursement procedure of Title XIX of the Social Security Act. Nor does the State effectively deal with the antitrust implications of Section 14053.5 by simplistically concluding that no antitrust problems are involved where the State elects to remove drug products from the Medi-Cal formulary.

At a time when the cost of governmental participation in state medical assistance programs is a matter of paramount concern to the American public, and at a time when rising prices throughout the economy emphasize the necessity of fostering competition, the price rigidity created by Section 14053.5 cannot be supported in law or in reason. Section 14053.5, as interpreted by the State and by the lower court, is an illogical and absurd response to a problem inherent in all governmental medical assistance programs. The statute is contrary to and preempted by the letter and spirit of the Federal antitrust laws and the Social Security Act. The statute poses problems which can only be resolved by this Court.

For the foregoing reasons, Robins respectfully requests this Court to grant its petition for writ of certiorari.

Dated: January 19, 1977.

Respectfully submitted,

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